

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CLORA C. REID

Claimant

VS.

ALWAYS THERE SENIOR CARE

Respondent

AND

TRAVELERS INDEMNITY COMPANY

Insurance Carrier

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Docket No. 1,045,663

ORDER

Respondent appeals the July 10, 2009, preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) and medical treatment after the ALJ determined that claimant's injury to her left knee arose out of and in the course of her employment with respondent.

Claimant appeared by her attorney, Garry L. Howard of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, William L. Townsley, III, of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as the ALJ, which consisted of the transcript of Preliminary Hearing held July 9, 2009, with attachments; and the documents filed of record in this matter.

ISSUE

Did claimant suffer an accidental injury which arose out of and in the course of her employment with respondent? Respondent contends that claimant's injury to her left knee is the result of a preexisting condition and any aggravation resulted from activities of day-to-day living and is not compensable. Claimant contends the ALJ was correct in

finding the injury to her left knee stemmed from an aggravation of a preexisting condition and the activities of her job exceeded those of her normal day-to-day living.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent as an in-home certified nurses aide (CNA) and home health aide (HHA). This job required claimant live in the home of the patient in need of assistance. Claimant would be on the clock for a 48-hour shift, actually living in the residence of the patient to provide around the clock care. This would require that claimant sleep approximately 8 hours per 24-hour shift and be awake, caring for the patient for the remaining 16 hours per 24-hour shift. On April 7, 2009, claimant was just under half way through a 48-hour shift when she began taking vital signs from Louie Kuhn, the patient under her care. After checking his vitals, claimant walked to a chair, intending to sit down to record the results of the vital signs. As claimant started to sit, her left knee popped and she experienced immediate pain in the knee with pain radiating into the left thigh and claimant was unable to bend her knee. Claimant used the patient's walker to support herself until she could actually sit down. She then called her son and Zach Henson, the owner of respondent's business, and advised them of her injury. Mr. Henson, along with Greg Feldman, a co-owner of respondent, came to Mr. Kuhn's residence and assisted claimant into her son's car. Claimant was then transported to the emergency room at Via Christi Regional Medical Center-St. Francis where she was diagnosed with a possible meniscal tear in the left knee. X-rays also identified moderate three-compartment osteoarthritic changes in the knee.

Claimant later obtained medical treatment from Wesley Medical Center. The initial reports indicated problems with claimant's right knee. However, white drawings associated with those reports display left knee pain and tenderness, with no symptoms on the right.

Claimant's medical history is significant in that she has had long-standing problems with her right knee. Claimant's right knee has been described as bone-on-bone and a knee replacement has been discussed. Claimant also had prior problems with her left knee, but not to the extent as the right. The left knee was identified as having arthritis and did cause claimant some pain. Additionally, health care providers identified the left knee as a potential problem because of the need to overcompensate for the right knee. But claimant had received little in the way of medical care for the left knee at the time of the accident.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Michael H. Munhall, M.D., for an evaluation on July 2, 2009. The history of injury to claimant's left knee, provided to Dr. Munhall, is consistent with the injury

process described by claimant in her testimony. At the time of the examination, claimant stood 4 feet 11 inches and weighed approximately 215 pounds. Dr. Munhall determined that claimant's ongoing left knee pain stems from the accident on April 7, 2009. Claimant was recommended for conservative care, including an orthopedic evaluation, MRI, and possible surgery to the knee if the conservative measures prove unsuccessful.

In describing her duties with respondent, claimant acknowledged the job caring for Mr. Kuhn required little or no lifting. Claimant stated that the job did require that she be on her feet approximately half of the day. As claimant was required to work a 16-hour shift for every 24 hours at the residence, this would require that claimant be on her feet at least 8 hours per 24-hour shift. This is more standing than claimant would normally do at home. Claimant testified that she rarely stood more than 30 percent of the time while at home.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.⁴

¹ K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 2008 Supp. 44-501(a).

⁴ *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

An injury is not compensable unless it is fairly traceable to the employment and comes from a hazard which the worker would not have been equally exposed to apart from the employment.⁵

An injury shall not be deemed to have been directly caused by the employment where the injury results from normal activities of day-to-day living.⁶

Here, it is undisputed that claimant's injury occurred while she was in the course of her employment for respondent. Claimant was just under half way through a 48-hour shift with her resident patient when her left knee popped. The dispute centers around whether the injury occurred out of the employment.

The Kansas Court of Appeals considered the legislative language dealing with day-to-day living in *Johnson*⁷. In *Johnson*, the claimant injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. The claimant immediately experienced severe pain in her left knee which would not straighten. The claimant in *Johnson* also suffered a meniscal tear in her left knee, and had a long history of problems with her left knee. Here, claimant has had a long history of problems with her right knee, but not with the left. The left knee was only determined to be arthritic.

Injury or personal injury has been defined to mean,

. . . any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence.⁸

In *Johnson*, the simple act of standing from a chair was deemed to not be an accident which arose out of and in the course of the claimant's employment. That same argument has been put forth here, as claimant was simply walking and attempting to sit in a chair when the accident occurred. However, here, claimant's duties required that she be on her feet longer than she would normally be while at home. In claimant's life, standing for 8 hours per day was not normal. Dr. Munhall opined that the standing and attempting to sit caused the meniscus tear and the ongoing need for treatment of claimant's left knee. This lesion or change in claimant's knee resulted from the body giving way under

⁵ *Johnson v. Johnson County*, 36 Kan. App. 2d 786, Syl. ¶ 1, 147 P. 3d 1091, rev. denied 281 Kan. ____ (2006).

⁶ *Id.*

⁷ *Id.*

⁸ K.S.A. 2008 Supp. 44-508(e).

the added stress of excessive standing. Here, following the policies in *Martin*⁹ and *Boeckmann*¹⁰, claimant's injury is traceable to her employment with respondent. The Order of the ALJ granting claimant medical treatment for the left knee and TTD is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.¹¹ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant suffered an accidental injury on April 7, 2009, to her left knee, which arose out of and in the course of her employment with respondent. The award of medical treatment and TTD by the ALJ is affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 10, 2009, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September, 2009.

HONORABLE GARY M. KORTE

c: Garry L. Howard, Attorney for Claimant
William L. Townsley, III, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge

⁹ See *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 615 P.2d 168 (1980).

¹⁰ See *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

¹¹ K.S.A. 44-534a.